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May 2, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, Room TW B204
Washington, D.C. 20554

Re: *Merger of Qwest Communications International, Inc. and U S WEST Inc., CC Docket No. 99-272*

Dear Ms. Dortch:

Attached are the Comments of AT&T Corp. on the March 22, 2002 Audit Report of Arthur Andersen regarding Qwest's compliance with the conditions imposed by this Commission in connection with its merger with US WEST.

It is now clear that Qwest has engaged in a deliberate campaign to evade the both the merger conditions imposed by the Commission and the most basic requirements of Section 271. Both the scope and egregiousness of the violations that have been exposed by the audits and two related complaints filed by Touch America are unprecedented. In order to bring the Qwest-US WEST merger into compliance with Section 271, Qwest committed to divesting its interLATA operations in the US WEST region to an "independent" competitor, Touch America. The Commission accepted US WEST's representations that Touch America would not be dependent upon Qwest and that Qwest therefore would not be "providing" interLATA services in violation of Section 271. According to Touch America, however, Qwest failed to live up to these representations but instead took a number of steps to ensure that Touch America would remain highly dependent on Qwest in providing services to divested customers. Worse yet, the Arthur Andersen audit and Touch America complaints provide substantial evidence showing that immediately after the "divestiture," Qwest undertook a concerted campaign to reacquire the most valued divested customers and to provide them (and others) with prohibited in-region interLATA services, through use of private line services offered under the guise of lit fiber capacity "indefeasible rights of use," by providing interLATA services to customers under the guise of "corporate communications," and, most brazenly, by directly provided interLATA services billed and branded as Qwest services.

The Commission should act promptly to remedy these apparent violations of the Qwest-US WEST merger conditions and Section 271. In particular, AT&T requests that the Commission: (1) issue a Notice of Apparent Liability regarding these material violations; (2) impose sanctions on Qwest for any and all violations of the Qwest-US WEST merger conditions and Section 271; (3) open an investigation into Qwest's candor in these proceedings and impose appropriate sanctions for any Qwest misrepresentations in the merger proceedings.

Sincerely,

/s/David L. Lawson
David L. Lawson

Attachment

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Merger of Qwest Communications	)	
International, Inc. and	)	
U S WEST Inc.	)	
	)	CC Docket No. 99-272
In the Matter of	)	
	)	
Application for Consent to	)	
Transfer Control to TeleDistance, Inc.	)	
from Qwest Communications	)	
International, Inc. to	)	
Touch America, Inc.	)	

COMMENTS OF AT&T CORP. ON THE MARCH 2002 AUDIT REPORT

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May 2, 2002

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COMMENTS OF AT&T CORP. ON THE MARCH 2002 AUDIT REPORT

AT&T Corp. ("AT&T") hereby submits its comments on the March 11, 2002 Arthur Andersen audit of Qwest Communications International, Inc. and its affiliates (collectively "Qwest"), the third such audit[1] of Qwest's compliance with the *Qwest Merger Orders*.[2]

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[1] Arthur Anderson LLP previously submitted an April 16, 2001 Report of Independent Public Accountants ("Initial Auditor's Report") and a June 6, 2001 Supplemental Letter to the Common Carrier Bureau.

[2] Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376 (2000) ("*March 10 Merger Order*"); Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 11909 (2000) ("*June 26 Merger Order*") (collectively the "*Qwest Merger Orders*").

INTRODUCTION AND SUMMARY

It is now clear that Qwest has engaged in a deliberate campaign to evade Section 271 of the Communications Act of 1934 ("the Act") and the related conditions imposed on Qwest as part of its merger with US WEST. The audit report comes on the heels of two related complaints[3] filed by Touch America, Inc. ("Touch America") against Qwest, and both the scope and egregiousness of the violations that have been exposed are unprecedented. In order to bring the Qwest-US WEST merger into compliance with Section 271, Qwest committed to divesting its interLATA operations in the US WEST region to an "independent" competitor, Touch America. The Commission accepted Qwest's and US WEST's representations that Touch America would not be dependent upon or controlled by Qwest and, therefore, that Qwest post-merger would not be "providing" interLATA services in violation of Section 271. There is now substantial evidence that Qwest took a number of steps that it concealed from the Commission to ensure that Touch America would remain dependent on Qwest in providing services to divested customers. The evidence provided by Touch America further shows that immediately after the "divestiture," Qwest undertook a concerted campaign to reacquire the most valued divested customers and to provide them (and others) with prohibited in-region interLATA services. The Commission should act promptly to remedy these apparent violations of Section 271 and the *Qwest Merger Orders.*

More specifically, although Qwest assured the Commission during the merger proceedings that Touch America would be independent of Qwest when providing in-region

[3] Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-003 (Feb. 2002) ("*IRU formal complaint*") and Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-004 (Feb. 11, 2002) (revised and refiled March 1, 2002) ("*Divestiture formal complaint*").

interLATA service,[4] it plainly was not. Qwest, for example, assured the Commission that it would provide Touch America with sufficient access to Qwest databases so that it could support the in-region service customers being divested to it,[5] but as explained by Touch America, "Qwest has exercised such control over the data systems and software as to prevent Touch America from independently operating or servicing Transferred Customers."[6] Qwest similarly assured the Commission that under the Bilateral Wholesale Agreement Touch America was not required to purchase out-of-region capacity on a wholesale basis from Qwest;[7] yet Touch America now says that Qwest's undisclosed billing system structure precluded Touch America from billing the transferred customers if it used a third party off-net provider for out-of-region capacity.[8] Qwest also represented to the Commission that it would lease to Touch America four circuit switches,[9] but Touch America has now disclosed that this did not occur and that Touch America was granted only limited functionality that did not "provide[] Touch America with the kind of

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[4] *See, e.g.*, Qwest's Divestiture Compliance Report, at 18 (April 14, 2000) ("*April 14, 2000 Divestiture Plan*") (that under the Divestiture Plan "Qwest has further protected Touch America's ability to maintain a viable independent business within the region without restricting Touch America's ability to grow its business for national accounts"); *see also id.* at 12 ("Touch America is a strong and independent carrier that has the financial capacity and operational experience to provide excellent service to the customer base that Qwest will be divesting").

[5] *Id.* at 40-41.

[6] *Divestiture formal complaint* ¶ 193.

[7] "Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report," Attachment A to Qwest's Reply Comments, at 20-21 (May 12, 2000) ("*Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report*").

[8] *Divestiture formal complaint* ¶¶ 306-307.

[9] *April 14, 2000 Divestiture Plan* at 4, 19-20, 42.

operational control over the switches that would allow Touch America to perform the 'core functions' associated with the operational management of a switch."[10]

Worse yet, Qwest never told the Commission about its "lit fiber" "Indefeasible Rights of Use" ("IRUs") agreement with Touch America, although it contemplated the need for such an agreement even before it submitted its Divestiture Plan and began "negotiations" with Touch America weeks before the Commission issued its *June 26 Merger Order*. Under this agreement, Touch America was required to pay Qwest for leasing interLATA network facilities *owned and operated by Qwest* in order to provide retail services to Touch America's "customers."

Having weakened Touch America in this manner, Qwest immediately began to provide (and continues to provide) in-region interLATA service and to reacquire the long distances customers that it "divested" to Touch America. As disclosed by Arthur Andersen and as elaborated upon in the Touch America complaints, Qwest has employed three separate schemes, each of which is patently unlawful: it has used lit fiber capacity IRUs like those it signed with Touch America,[11] it has provided interLATA services to customers under the guise of "corporate communications,"[12] and, most brazenly, it has directly provided interLATA services "billed and *branded* as Qwest services."[13] As demonstrated below, each of these actions violates both Section 271 and the *Qwest Merger Orders*.

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[10] *Divestiture formal complaint* ¶ 282; *see generally id.* ¶¶ 272-292.

[11] Letter from Arthur Anderson LLP to Dorothy Attwood (June 6, 2001), Finding 7 ("June 6, 2001 Supplemental Letter") (found with respect to 14 of 92 in-region service component codes sampled).

[12] *Id.*, Finding 2 (11 of the 458 account records were identified as providing prohibited in-region service in this manner).

[13] Report of Independent Accountants, Att. 1 at 1 (April 16, 2001) ("Initial Auditor's Report") (emphasis added); *see also id.* (for 266 customers with associated revenues from July 2000 through March 2001 in excess of $2.2 million); June 6, 2001 Supplemental Letter, Finding 9

(continued . . .)

As unambiguous Commission and court precedents confirm, the Qwest lit fiber capacity IRUs clearly are, regardless of their duration and payment terms, "telecommunications services" subject to the Section 271 interLATA restrictions. Qwest concedes, as it must, that these IRUs grant the customer only a leasehold interest in the lit fiber and not an ownership interest,[14] and that concession is dispositive. Both the Commission and the courts have repeatedly held that "leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service."[15]

Qwest claims that the Commission approved these IRU arrangements in the *Qwest Merger Orders*, but that too is plainly false. The *June 26 Merger Order* does not even reference any such IRUs. Nor could it have done so, because the only references that *Qwest* ever made to IRUs in any of its submissions during the merger proceedings were always preceded with the assertion that the relevant IRUs involved a "one-time transfer of ownership and control of an interLATA network."[16] Of course, Qwest now concedes that the IRU agreements that it has actually entered into with Touch America and others do *not* involve the transfer of ownership and control rights in anything, let alone an "interLATA network." Certainly, Qwest never

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(. . . continued)
(Qwest paid touch America only $856,863 out of $2,212,730 billed under for in-region interLATA services sold under Qwest's brand).

[14] *See* Amended Answer of Defendants Qwest Communication International Inc., Qwest Corporation and Qwest Communications Corporation, File No. EB-02-MD-003, ¶¶ 142 145 (March 13, 2002) ("Qwest Answer to the *IRU formal complaint*") .

[15] Second Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended*, 12 FCC Rcd. 8653, ¶ 54 n.110 (1997) ("*Non-Accounting Safeguards Order*"); *Global Naps, Inc. v. New England Telephone & Telegraph*, 156 F. Supp.2d 72, 77-80 (D. Mass. 2001) ("leasing of dark fiber . . . [is] the provision of telecommunications service").

[16] *See April 14, 2000 Divestiture Plan* at 28-29.

disclosed the lit fiber capacity IRU arrangement it was negotiating with Touch America while the merger proceedings were ongoing – although, under the *March 10 Merger Order*, it was clearly required to do so.[17] In short, the post-merger lit fiber capacity IRU arrangements neither were, nor could have been, approved in the *Qwest Merger Orders,* and they flatly violate Section 271.

Qwest used these lit fiber capacity IRUs as part of a winback strategy for large customers to replace private line services provided by Touch America. Thus, as set forth in Touch America's complaints, Qwest was able to reacquire Teleglobe, which was receiving leased line private line service from Touch America, by offering it lit fiber capacity IRUs.[18] Similarly, in March 1998 Qwest announced a 15-year pre-paid private line service arrangement with Verio.[19] Verio was then divested to Touch America and reacquired by Qwest with lit fiber capacity IRUs.[20] Touch America identified four other private line customers reacquired by Qwest using lit fiber capacity and alleges that a number of government accounts were also affected.[21] A complete investigation would undoubtedly reveal more violations.

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[17] *See March 10 Merger Order* ¶ 25 ("In addition to information on the divestiture, we expect the Applicants to be forthcoming and provide information on *any* business arrangement, beyond customer support, that would implicate a section 271 issue").

[18] *IRU formal complaint* ¶¶ 75, 78.

[19] *See* Verio Form S-1/A filed on May 8, 1998, Exhibit 10.25, http://www.sec.gov/Archives/edgar/data/1040956/0000950134-98-003922.txt ("*Verio/Qwest Capacity Service Agreement*")

[20] *IRU formal complaint* ¶¶ 53-54.

[21] *Id.* ¶¶ 26-80.

There is likewise considerable evidence that Qwest has been using in-region interLATA "corporate communications" in violation of Section 271.[22] Touch America's complaints allege that Qwest has in fact been using its "corporate communications" to provide ordinary telecommunications services to unaffiliated third parties and that these services are not permissible Official Services or incidental interLATA services. And all three audit reports reveal that Qwest has, in addition to these "stealth" in-region InterLATA services, also directly provided millions of dollars of *Qwest branded* in-region interLATA services and retained a substantial portion of the revenues from such services.

In short, the three audit reports and the Touch America complaints establish a strong *prima facie* case that Qwest has violated the *Qwest Merger Orders* and Section 271. AT&T accordingly requests that the Commission: (1) issue a Notice of Apparent Liability regarding these material violations; (2) impose sanctions on Qwest for any and all violations of the *Qwest Merger Orders* and Section 271; (3) open an investigation into Qwest's candor in these proceedings and impose appropriate sanctions for any Qwest misrepresentations in the merger proceedings.

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[22] *Divestiture formal complaint* ¶¶ 338-40, 350-54, 431-46, 506.

ARGUMENT

I. THE MARCH 2002 AUDIT AND TOUCH AMERICA'S COMPLAINTS CONFIRM THAT QWEST HAS, AND CONTINUES TO, DELIBERATELY PROVIDE SERVICES IN VIOLATION OF SECTION 271.

A. Qwest Is Using Lit Fiber Capacity IRUs To Provide Prohibited In-Region InterLATA Services.

1. The Qwest Lit Fiber Capacity IRUs are Service Agreements that do not Involve the Transfer of any Ownership Rights

Under the *June 26 Merger Order*, Qwest, in order to "comply with the section 271 prohibition on the BOCs performing interLATA transmission" cannot provide, *inter alia,* "all retail and wholesale private line voice and data services where a circuit provided to a customer crosses a US WEST LATA boundary, and [may not receive] revenues from these in-region services."[23] Qwest does not challenge that its lit fiber capacity IRUs are used to provide services that cross a US WEST LATA boundary, but assert that IRUs are not a "telecommunications service" but rather a "telecommunications facility" and hence not subject to Section 271.[24] Denominating a service arrangement as an "IRU" does not however, as Qwest claims, immunize the arrangement from the *Qwest Merger Orders* conditions or Section 271. Rather, as explained below, Qwest's lit fiber capacity IRUs are nothing more than telecommunications service arrangements, with Qwest "providing" in-region interLATA dedicated leased private line service.

[23] *June 26 Merger Order* ¶¶ 9, 13.

[24] *See e.g.,* Qwest's Answer to the *IRU formal Complaint* at 5-6.

a. The Qwest lit fiber capacity IRUs are nothing more than long-term private line service agreements.

It is eminently clear from the Qwest/Touch America IRU appended to Touch America's complaint,[25] as well as from Qwest's characterizations of the IRUs offered to its re-acquired customers, that the Qwest lit fiber capacity IRUs involve the provisioning of a "telecommunications service" subject to Section 271 and not the transfer of ownership and control of an interLATA network. Each Qwest lit fiber capacity IRU is for part of the capacity on a cable controlled overall by Qwest. Qwest effectively operates the cable; the customer has no right to re-deploy or replace the electronics used by Qwest on the cable; and Qwest can even control what path is used to get from point "A" to point "B."[26] While there is a prepaid fee, there can also be sizeable monthly recurring "operations and maintenance" payments.[27]

Thus, under the terms of the Touch America lit fiber capacity IRU, the grantee merely obtains "digital transmission capability" by means of Qwest's Network facilities which are "*inclusive of all electronics and other equipment* necessary for the intended operation of the Capacity."[28] Significantly, the Agreement provides that the IRU "does *not* provide Customer

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[25] All cites to the Qwest Touch/America IRU Agreement are to the redacted version filed by Touch America as a public document in the *IRU formal complaint* proceeding. *See* Redacted IRU Agreement between Qwest and Touch America, Exhibit S to the *IRU formal complaint* ("Qwest/Touch America IRU Agreement").

[26] *See* Qwest/Touch America IRU Agreement, Sections 2.1 (the IRU grant), read in light of the definitions in 1.2 (Capacity), 1.9 and 1.10 (defining the different amounts of capacity); *id.*, Section 6.1 (first) (limiting rights to control); Qwest's Answer to the *IRU formal complaint* ¶ 84 (conceding that the various lit fiber capacity IRU agreements involve only rights to "specific increments in capacity between two identified points").

[27] Qwest/Touch America IRU Agreement, Section 3.2 (requiring payments of $150,000 per month).

[28] *Id.*, Sections 1.2, 2.1 (emphasis added).

with *any ownership or other possessory interests* in any real property, conduit, fiber, or equipment in or on the Qwest Network or along the User Route of the Qwest Network (the "Physical Assets)."[29] Indeed, the Agreement expressly denies that the customer has any "*right to control* any network or service configuration or design, routing configuration, regrooming, rearrangement or consolidation of channels or circuits or any similar or related functions with regard to the Qwest Network."[30] To the contrary, the Agreement provides that the customer's right to use capacity is "subject to and shall be implemented in accordance with Qwest's network operations and maintenance procedures and policies, as these may be modified from time to time by Qwest."[31] Finally, the Agreement provides that when service is interrupted, Qwest will provide the Customer with an "Outage Credit."[32]

The sole "property right" that Qwest claims is transferred in any of its lit fiber capacity IRUs is the ability to choose "the type of traffic and direction . . . to transmit over the facility."[33] But that "right" accompanies *all* leased private lines services.[34] In the context of the totality of the benefits, risks and burdens under the lit fiber capacity IRU, it is clear that, despite their duration, Qwest's lit fiber capacity IRUs involve simply the providing of dedicated private line service, similar to the 15-year prepaid capacity service agreement Qwest entered into with Verio

[29] *Id.*, Section 13.1 (emphasis added).

[30] *Id.*, Section 6.1 (first).

[31] *Id.*

[32] *Id.*, Section 6.2.

[33] Qwest's Answer to the *IRU formal complaint* ¶¶ 84, 88; *see also id.* ¶¶ 49-50.

[34] *See* Affidavit Mark Maroney ¶¶ 4-10, Exhibit 4 to the *Divestiture formal complaint* ("Maroney Affidavit").

prior to its merger with US WEST,[35] and substitutable for the private service Touch America recently provided Teleglobe until Qwest reacquired that company using a lit fiber capacity IRU.[36]

As a result of this aggressive use of lit fiber capacity IRUs, Qwest is deriving substantial revenues from long distance customers reacquired from Touch America.[37] It is also deriving substantial revenues from newly acquired long distance customers (including pre-existing Touch America customers).[38]

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[35] *Compare Verio/Qwest Capacity Service Agreement, supra, with* Qwest/Touch America IRU Agreement, Sections 1.1 (Services to Be Provided by Qwest including capacity), 4.1 (15 year term), 5.3 (prepayment) & Exhibit A, Section 5.1 (Outage Credits).

[36] *IRU formal complaint* ¶¶ 75, 78.

[37] *Id.* ¶¶ 47-78. Qwest reacquired the Teleglobe account in December 2000; Verio, Inc. and CAIS Internet in August 2000, Abovenet in September, 2000, and Flag Telecom and Star Telecom in October 2000. *IRU formal complaint* ¶¶ 52-78, 172 & Affidavit of Frank O'Connor ¶¶ 3-7, 16, Exhibit O to the *IRU formal complaint* ("O'Connor Affidavit"). Qwest's purported explanation for the reacquisition was that the initial divestiture of these customers was the result of a computer programming error, Qwest's Answer to the *IRU formal complaint* ¶¶ 52, 87 (that the program "was overinclusive and that . . . approximately 50 IRUs for approximately 9 customers mistakenly were identified as telecommunications services"), was refuted by the March 7, 2002 Declaration of Kevin Dennehy ¶¶ 3-7, ("March 7 Dennehy Affidavit"), Exhibit G to Touch America's Reply to the *IRU formal complaint*. Qwest's assertions are also not credible in light of Qwest's representations in its *April 14, 2000 Divestiture Plan* about the efforts it took to properly identify the divested accounts, *see, e.g.*, *id.*, cover letter at 1-2 ("For nearly nine months Qwest personnel have been engaged in the process of segregating the company's in-region interLATA business ... the parties have approached the divestiture task comprehensively, and with due regard to the requirements of the Act and the interests of impacted customers"). Touch America alleges that Government accounts were also acquired. *IRU formal complaint* ¶¶ 66; March 7 Dennehy Affidavit ¶¶ 8-13. In September 2000, Qwest marketed to Microsoft Network Corporation ("MSN") a $5 million IRU between MSN's Seattle, Washington office and San Jose, California "in order to resolve a problem MSN was having with Qwest divesting part of its business to Touch America." *IRU formal complaint* ¶ 40.

[38] *IRU formal complaint* ¶¶ 47-51 (including Winstar Communications, Dancris Teleco and Vulcan NW); *see also* Affidavit of Frank Ferdosian ¶¶ 6, 12, 15-18, Exhibit H to the *IRU formal complaint* ("Ferdosian Affidavit"); Affidavit of Michael Welker ¶¶ 5, 7 and 9, Exhibit D to the *IRU formal complaint* (Welker Affidavit"). Touch America avers that Qwest has earned "over $1 billion through purported lit capacity IRU 'sales' since divestiture," that "a significant

(continued . . .)

In providing in-region interLATA service through these lit fiber capacity IRUs, Qwest is violating the very underpinnings of Section 271 because the IRUs provide Qwest with the incentive to abuse its bottleneck to harm Touch America and other authorized long distance carriers in order to increase its IRU sales.[39] The lit fiber capacity IRUs allow Qwest "to accumulate an entrenched base of full-service customers before receiving section 271 authority, thereby undermining the incentive Congress created in section 271."[40] Qwest is effectively holding itself out as a provider of long distance service, and it is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public.[41]

b. Commission and Court precedents foreclose Qwest's position that its lit fiber capacity IRUs are not telecommunications services.

Qwest does not – and cannot – deny that it continues to own and control the facilities purportedly "sold" by the lit fiber capacity IRU. Instead, Qwest principally argues that the Commission has blessed the use of lit fiber capacity IRUs in these circumstances. The Commission has done no such thing.

(. . . continued)
percentage of that revenue was derived from in-region customers" and that "IRUs alone accounted for more than 40% of Qwest's total second quarter 2001 growth." *IRU formal complaint* ¶¶ 174-177. Qwest itself avers that its in-region sales of IRUs since July 1, 2000 "were approximately $261 million." Qwest's Answer to the *IRU formal complaint* ¶ 175.

[39] *See* Memorandum Op. and Order, *AT&T Corp. v. Ameritech Corp. et al.,* 13 FCC Rcd 21438 (1998) ("*Qwest Teaming Order*"), *aff'd sub nom., US WEST Communications, Inc. v. FCC,* 177 F.3d 1057 (D.C. Cir. 1999).

[40] *March 10 Merger Order* ¶ 13.

[41] *Id.* ¶ 18.

As Qwest notes, the *Non-Accounting Safeguards Order*,[42] holds that "the one-time transfer of ownership and control of an interLATA network is not an interLATA service, which means it falls entirely outside the Section 271/272 framework that governs interLATA services."[43] But that decision stands for the unremarkable proposition that sale of an *entire network* does not constitute "providing" the services on that network.[44] What Qwest ignores is that the Order goes on to make clear that the conveyance of an interest *less* than full ownership of the entire network does constitute the provisioning of telecommunications services for the purposes of Section 271. Thus, the Commission held that when "the BOCs seek to *maintain* ownership of their interLATA Official Services Networks and *lease* excess *capacity* on the networks to their affiliates," that "*leasing of capacity on an in-region interLATA network is plainly an in-region interLATA service*."[45] Here, the express language of the lit fiber capacity IRU states that it is a lease of capacity and not a sale.[46]

This is consistent with the Commission's regulatory treatment of leased facilities prior to the 1996 Act. In its *Dark Fiber Order*,[47] the Commission was faced with a request by several Bell Operating Companies ("BOCs") that they no longer be required to provide "dark fiber service," – *i.e.*, the "provision and maintenance of fiber optic transmission capacity between

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[42] Qwest Answer to *IRU formal complaint* ¶ 1 (citing to the *Non-Accounting Safeguards Order* ¶ 54 n.110).

[43] *Non-Accounting Safeguards Order* ¶ 54 n.110 (emphasis added).

[44] *Id.*

[45] *Id.* (emphasis added).

[46] Qwest/Touch America IRU Agreement, Section 14.2; *see also id.*, Sections 1.2, 2.1.

[47] Memorandum Op. and Order, *Application of Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, 8 FCC Rcd. 2589 (1993), *remanded on other grounds, Southwestern Bell Tel. Co. v. FCC,* 19 F.3d 1475 (D.C.Cir.1994).

customer premises where the electronics and other equipment necessary to power or 'light' the fiber are provided by the customer, not the local exchange carrier." The BOCs argued, as Qwest argues here, that the Commission lacked jurisdiction to regulate their business of leasing dark fiber because dark fiber is not itself a "service." The Commission expressly rejected this argument that dark fiber constituted a "facility construction," finding instead that the BOCs were engaged in the provisioning of a communications service.[48]

The federal courts have affirmed that view. Relying on the *Non-Accounting Safeguards Order* and the *Dark Fiber Order*, the federal district court in *Global Naps, Inc. v. New England Telephone & Telegraph*, held that leasing of dark fiber "constitutes [the] provision of telecommunications service" and is not a "facility" and thus cannot be provided by a BOC before receiving Section 271 approval.[49] *A fortiori*, if merely providing a customer a strand of fiber without any attached electronics constitutes a "telecommunications service," a lease in which Qwest actively manages the electronics used to operate the fiber, provides the customer with "outage" credits, and controls the path the traffic travels, constitutes a "telecommunications service."[50]

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[48] *Id.*¶ 17.

[49] *Global Naps*, 156 F. Supp.2d at 77-80.

[50] Other federal courts that have applied these precedents in the context of determining incumbent LEC unbundling obligations regarding dark fiber have also concluded that dark fiber is a telecommunications service. Thus, for example, in *MCI Telecomms. Corp. v. BellSouth Telcomms., Inc.*, 7 F.Supp.2d 674, 679-80 (E.D. N.C. 1998) the district court addressed the issue of whether dark fiber is a network element. BellSouth contended that dark fiber could not be a "network element," which is defined to be a "facility or equipment *used* in the provision of a telecommunications service," because dark fiber is "merely inventory." *Id.* at 680. Relying on the *Dark Fiber Order*, the district court disagreed, finding that dark fiber was a "telecommunication service." *Id.* at 680. Other district courts have subsequently followed the reasoning in this decision. *See, e.g., MCI Telecomms. Corp. v. Michigan Bell Tel. Co.*, 79 F.Supp.2d 768, 783-84 (D. Mich. 1999).

The *Qwest Teaming Order* likewise establishes that Qwest's attempt to rely on mere formalisms to obscure the underlying substance of the services that it is providing must fail. Determining whether a BOC is providing interLATA service in violation of Section 271 requires an examination of the totality of a BOC's involvement in an interLATA offering, and "encompass[es] activities that, if otherwise permitted, would undermine Congress' method of promoting both local and long distance competition by prohibiting BOCs from full participation in the long distance market until they have open their local markets to competition pursuant to section 271's competitive checklist."[51] As explained above, Qwest is using the lit fiber capacity IRUs to earn long distance revenues prior to opening its local markets to competition. As a result, it would have both the incentive and ability to use its control of local bottleneck facilities to protect these long distance revenues from competition on the merits.

Given these holdings, it is unsurprising that the three Commission decisions involving submarine cable IRUs relied upon by Qwest are inapposite. According to Qwest, these decisions define submarine cable IRUs as a "communications facility."[52] But even if the "facilities" label was relevant to section 271 (which, as shown above, it is not) those precedents are inapposite for at least two additional reasons. First, those decisions do not stand for the proposition that all IRUs are "communications facilities." To the contrary, the Commission defined submarine cable IRUs in the context of how they were used in the 1980s, that is, involving "the conveyance of circuits in submarine cables." *Reevaluation of the Depreciated-Original-Cost Standard in Setting Prices For Conveyances of Capital Interests in Overseas*

[51] *Qwest Teaming Order* ¶ 30.

[52] Qwest Answer to *IRU formal complaint* ¶ 112.

Communications Facilities Between or Among U.S. Carriers.[53] The IRUs at issue in these decisions were also of unlimited duration.[54] While the nature of some IRUs may have changed since these Commission decisions – for example, a small minority of submarine cable IRUs may now be for a term of years – those decisions do not mean that these newer "IRUs" are still "facilities" and not services. To the contrary, as the Commission admonished in *Market Entry and Regulation of Foreign-Affiliated Entities*, the mere leasing of capacity rather than the purchase of half-circuits on submarine cables would *not* be the basis for classifying a foreign carrier as a facilities based carrier.[55] Thus, to the extent these decisions are relevant, they stand for the proposition that arrangements that merely lease capacity – like Qwest's lit fiber capacity IRUs – do not transfer ownership of the underlying facilities.

Qwest's attempt to characterize the lit fiber capacity IRUs as a "sale" because "the *capacity's* estimated economic life [is] typically 20 years"[56] is a *non-sequitor*. Only assets themselves have an economic life. In contrast, the right to "[c]apacity" on those facilities has no "economic life" because the underlying assets can be swapped and upgraded. Here, as described above, all that is conveyed to the customer by the lit fiber capacity IRU is the right to capacity

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[53] 7 FCC Rcd. 4561, ¶ 1 n.1 (1992).

[54] The Commission observed that because the IRUs at issue were for the life of the submarine cable, the corresponding monthly maintenance and operating expenses born by IRU holders represented an "open-ended commitment." *Id.* n.138. *See also* Report and Order, *International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities, and Assignment of Data Network Identification Codes*, 104 FCC.2d 208, ¶ 64 (1986) (the Commission similarly referred to acquiring IRUs "*in cable circuits*").

[55] Report and Order, *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd. 3873, ¶ 130 (1995) (classifying as facilities based a carrier that leased a half *circuit* on a common carrier cable but excluding the lease of a private line).

[56] Qwest Answer to *IRU formal complaint* ¶ 84.

without any corresponding ownership in the underlying assets. Under the Qwest lit fiber capacity IRUs the customer is granted only "specific increments of capacity between two identified points on the Qwest fiber network,"[57] Qwest controls what path is used to get from point "A" to point "B,"[58] and Qwest "does *not* provide Customer with *any ownership or other possessory interests* in any real property, conduit, fiber, or equipment in or on the Qwest Network or along the User Route of the Qwest Network (the "Physical Assets)."[59]

The two additional precedents cited in Qwest's Answer to Touch America's *IRU formal complaint* are equally inapposite. The Fourth Order on Reconsideration in *Federal-State Joint Board on Universal Service*[60] held that although both common carrier and non-common carrier satellite operators must contribute to universal service, when a satellite operator grants a customer "the exclusive right to transmit to a specified piece of hardware on the satellite," this does not trigger universal service fund contribution obligations that apply to "telecommunications carriers."[61] As described above, Qwest's lit fiber capacity IRUs do not amount to the sale of bare capacity. To the contrary, Qwest controls the network used by the customer, provides the electronics necessary for service, assumes the risk of service outage, maintains ownership of the underlying facilities, and even controls the path used to deliver the customer's traffic.

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[57] *Id*; *see also* Qwest/Touch America IRU Agreement, Section 2.1.

[58] *See* Qwest/Touch America IRU Agreement, Section 6.1 (first) (limiting rights to control).

[59] *Id.*, Section 13.1 (emphasis added).

[60] Fourth Order on Reconsideration, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 5318, ¶ 290 (1997) (*cited in* Qwest's Answer to the *IRU formal complaint* at 8 and n.8 & ¶ 112).

[61] *Id.* ¶ 290.

Likewise, in the First Report and Order in *Federal-State Joint Board on Universal Service*,[62] the Commission held that a carrier that provides the services designated for universal service support using either its own facilities or a combination of its own facilities and unbundled network elements may be designated as a carrier eligible to receive universal service high-cost support. The Commission construed the term "own facilities" in Section 214(e)(1)(A) to include "unbundled network elements" not because the competitive local exchange carrier ("LEC") actually "owned" the unbundled network element – indeed, the Commission rejected the notion that "own facilities" should be interpreted to mean "owned by"[63] – but because such a result was dictated by fundamental principles of "competitive neutrality."[64] The Commission reasoned that it would essentially skew competition if the competitive LEC having paid the incumbent LEC the full forward-looking cost of the unbundled network element ("UNE") did not receive support while the incumbent LEC did receive support for its own network (support which would also be reflected in the price of resold services).[65] By contrast, Qwest is seeking here to circumvent the Act's prohibition of BOC participation in the long distance market until they have open their local markets to competition, by characterizing its leased dedicated private line service as a "facility" when it is not.

[62] First Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1997), *aff'd sub nom., Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

[63] *Id.* ¶ 159.

[64] *Id.* ¶ 156.

[65] *Id.* ¶¶ 156-166

c. Precedent in related areas further confirms that lit fiber capacity IRUs are a service.

Qwest's lit fiber capacity IRUs are also to be treated as a service under relevant securities, tax and bankruptcy law. Thus, in *In re E.Spire Communications, Inc. Securities Litigation*, the court held that whether an IRU was to be accounted for as a "sale" or a "service turned on "whether a particular IRU between the parties contained provisions resulting in a transfer of title."[66] Under this analysis, Qwest's lit fiber capacity IRU, involving no conveyance of ownership rights, is for accounting purposes a "service." Securities and Exchange Commission officials have similarly admonished the accounting industry that a lit fiber capacity IRU is "nothing more than a service agreement" where there is no conveyance of rights in the conduit, fiber and electronics, and should be accounted for accordingly.[67]

Similar considerations apply to how revenue is to be reported for tax purposes. For federal tax law purposes whether an IRU involves a sale, lease or service, turns on a number of considerations of which duration is only one. Equally, if not more significant, are issues of ownership and control: where an IRU conveys to the service *recipient* only a right to use an

[66] 127 F. Supp.2d 734, 747 (D. Md. 2001) (ruling on whether a plaintiff had adequately pleaded *scienter* in a securities fraud case, noted that whether the defendant followed proper accounting procedures by recognizing all of the revenue from an IRU immediately upon delivery (as a sale) rather than ratably over the life of the IRU (as a service).

[67] *See* Testimony Concerning Telecommunications Accounting Issues by John M. Morrissey, Deputy Chief Accountant, U.S. Securities and Exchange Commission, Before the Subcommittee on Oversight and Investigations Committee on Financial Services given on March 21, 2002 at 3 ("SEC Global Crossing testimony") ("If the [capacity IRU] does not convey to the purchaser the right to use specific identifiable assets, the contract would be viewed as an arrangement for the provision of services, and revenue would be recognized over the period of the contract as the services (the access to the network capacity) are provided"); *see also*, Lichtenstein and Rohe, *The Treatment of IRUs in Bankruptcy Proceedings*, 11 Journal of Bankruptcy Law and Practice, November/December 2001 ("*Treatment of IRUs*") at 87, n. 13 (*citing* Arthur Andersen White Paper, Accounting by Providers of Telecommunications Network Capacity, An Update (as of February 29, 2000), at 1 (citing to a statement by an SEC official)).

assigned amount of capacity while the service *provider* is responsible for maintenance, replacement and repair, and the service provider can utilize the underlying assets to provide services to entities unrelated to the service recipient, the IRU is likely to be a service agreement.[68] Indeed, the Qwest lit fiber capacity IRU agreement provides that "the grant of the IRU in the Qwest Capacity hereunder shall be treated for federal, state and local tax purposes as the lease of the Qwest Capacity."[69]

Finally, under bankruptcy law, the extent to which the executory portion of even a 20-year, pre-paid lit fiber capacity IRU can be rejected turns on whether "the rights and obligations of the grantee . . . resemble those of a purchaser of an equivalent asset."[70] Where, as with the lit fiber capacity IRU agreements at issue here, they do not, the agreement, despite its duration, is a mere service agreement.[71]

2. The Commission did not Explicitly or Implicitly Approve the Lit Fiber Capacity IRUs being Sold by Qwest.

Unable to show that lit fiber capacity IRUs effectively constitute the sale of network facilities under applicable precedents, Qwest makes the astonishing claim that the Commission nonetheless approved of these unlawful arrangements in authorizing the license transfers associated with the Qwest-US WEST merger. Qwest asserts in its Answer to Touch America's

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[68] Frederick W. Quattlebaum, Ventures on the High Seas: US Federal Tax Treatment of a Sale of IRU Capacity, 1192 PLI/Corp 583 (2000) ("*PriceWaterhouseCoopers, IRU Tax Treatment*").

[69] *IRU formal complaint* ¶ 142 (*citing* ¶ 14.2 of the Agreement).

[70] *Treatment of IRUs* at 94-95 (noting that it would be "difficult for a bankruptcy court to see how the benefits, risks and burdens under [a long-term prepaid lit fiber capacity IRU] are similar to a sale and purchase" and that to avoid this problem "the rights and obligations of the grantee must resemble those of a purchaser of an equivalent asset," including, *inter alia*, the right of the grantee to substitute another provider for operation and maintenance services).

[71] *Id.*

IRU formal complaint that its decision to sell lit fiber capacity IRUs to third parties "was conscious and deliberate," that it had "disclosed such plans at pages 28-30 of the [*April 14 2000 Divestiture Plan*], and [that] the Commission approved the divestiture plan on the basis of the entire record in that proceeding, including those disclosures regarding lit Capacity IRU property transactions in-region."[72] Qwest also relies on a March 29, 2000 *ex parte* meeting with the Commission to justify its actions.[73]

Qwest's attempted justifications are specious. The portion of the *April 14, 2000 Divestiture Plan* referred to by Qwest in no way made reference to the Qwest lit fiber capacity IRUs described in the preceding section. In the *April 14 2000 Divestiture Plan* Qwest, after referring to past sales of capacity in the form of IRUs that it could not unwind (in a footnote identifying a *single* transaction, Project Abilene, discussed more fully below), referred to "'the one-time transfer of ownership and control of an interLATA network'" and then asserted "Qwest also intends to continue selling *similar* telecommunications facilities in the future."[74] The lit fiber capacity IRUs on their face cannot be considered "similar" to "sal[e]" of "ownership and control of an interLATA network." As noted above, the Qwest lit fiber capacity IRUs expressly *preclude* any transfer of ownership or control.

With respect to the single past transaction identified, "Project Abilene" that was described as "the next generation Internet science research effort operated by University

[72] Qwest Answer to the *IRU formal complaint* ¶ 94.

[73] *Id.* ¶¶ 37, 85, 125, 161, 171.

[74] *April 14 2000 Divestiture Plan*, at 29 (emphasis added).

Corporation for Advanced Internet Development ('UCAID') . . . a public charity."[75] Qwest explained that it:

> developed a plan that avoids disruption of the Abilene Research network while complying fully with Section 271. Specifically, Qwest will make a *contribution*, in the form of *IRUs* in the relevant transmission *capacity* to a newly formed and/or one or more existing non-profit organizations. This contribution will be final and permanent, and Qwest will have no right to reacquire the rights in these IRUs. The entity receiving these IRUs will make the capacity available to UCAID. (For tax reasons, UCAID itself is unable to accept such a large gift).[76]

Regardless of whether this transaction would constitute the offering of a telecommunications service within the meaning of the Act, it has no relevance to the lit fiber capacity IRUs now being sold by Qwest.[77] There is no way that the lit fiber capacity IRUs being marketed by Qwest can be considered comparable to the *permanent* donation of IRUs for the benefit of a charity.

Qwest's counsel, in an affidavit which accompanied Qwest's Answer to the *IRU formal complaint*, also refers to alleged statements that Qwest representatives made during an *ex parte* meeting with the Commission Staff on March 29, 2000.[78] Specifically, he alleges that Qwest representatives stated to the Commission staff that Qwest's "past" IRU agreements "*conveyed permanent property ownership rights in such network facilities* for the economic life of the

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[75] *Id.* at 28-29 & n.43.

[76] *Id.* (emphasis added)

[77] *See* 47 U.S.C. § 153(46) ("The term 'telecommunications service' means the offering of telecommunications *for a fee* directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used" emphasis added). AT&T did comment on this footnote in the context in which it was made. *See also* AT&T's May 5, 2000 Comments at 24 and n. 69.

[78] Affidavit of David L. Sieradzki, Exhibit 3 to Qwest's Answer to the *IRU formal complaint* ¶ 2.

facilities."[79] At that meeting, Qwest allegedly represented to the Staff that "that there is ample FCC precedent for treating *such* Capacity IRUs as conveyances of network facilities" and that "[t]he FCC staff members present *generally* assented that such activities would be consistent with Section 271, under established precedents governing capacity IRUs."[80]

The Touch America representative who attended the meeting denies that any such conversations occurred. Indeed, he states that "[a]t no time during the meeting while I (or any Touch America representative) was present, did Qwest representatives describe any past sales of Indefeasible Rights of Use" or "lit fiber capacity or past sales related thereto" or "FCC precedent for treating capacity IRUs as sales of network facilities rather than telecommunications services."[81]

Even if the alleged discussions did occur, the only thing that Staff could be said to have "assented" to was the "convey[ance of] permanent property ownership rights in the network" by Qwest. As described above, the lit fiber capacity IRUs at issue do not transfer ownership of Qwest's fiber to the customer – Qwest retains ownership in the underlying fiber and merely leases capacity to the customer. The affidavit of Qwest's counsel also notably fails to describe what statements were made by the Commission Staff which allowed Qwest to divine that the Staff gave its "general" assent. Nor does the affidavit explain what the qualification "general[ly]" assented to means. Repeating the mantra "IRUs" and "property transactions" (although the relevant test is whether there is a transfer of full ownership rights) does not

[79] *Id.* ¶¶ 2-4 (emphasis added).

[80] *Id.* ¶ 3 (emphasis added).

[81] Declaration by Kenneth L. Williams ¶¶ 6-8, Exhibit B to Touch America's Reply to the *IRU formal complaint* ("Williams Affidavit").

magically convert a lit fiber capacity IRU that is "nothing more than a service agreement" into something that passes muster under the *June 26 Merger Order* and Section 271.

Of course, even if Qwest could document some implicit Staff "assent" in an *ex parte* meeting to arrangements Qwest never disclosed, that could not constitute Commission approval of those arrangements. The Commission's *June 26 Merger Order* never even refers to lit fiber capacity IRUs either generally, or in terms of the Qwest IRUs at issue here. Nor could it have, as Qwest went to great lengths to conceal the true nature of the arrangements it planned to use post-merger. Although by its own admission Qwest contemplated entering into a lit fiber capacity IRU agreement with a potential buyer as early as February 2000,[82] Qwest waited until mid-June 2000 to formally begin negotiations with Touch America (*i.e.*, after the time for submitting Comments on the merger had lapsed but weeks before the Commission issued its Order)[83] and held off signing that agreement until a few days after the Commission's *June 26 Merger Order* was issued. Failure to submit the lit fiber capacity IRU arrangement with Touch America violated Qwest's obligations under the *March 10 Merger Order*, which required full disclosure of the relevant arrangements between Qwest and Touch America:[84] "In addition to information on the divestiture, we expect the Applicants to be forthcoming and provide information on *any* business arrangement, beyond customer support, that would implicate a section 271 issue."[85]

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[82] Declaration of Linda L. Oliver ¶ 4 (Exhibit 10 to Qwest's Answer to the *IRU formal complaint*) (describing a February 24, 2000 *ex parte* meeting with the Commission staff where Qwest allegedly raised the issue of selling lit fiber capacity to a different potential buyer).

[83] January 24, 2002 Affidavit of Kevin Dennehy ¶ 9, Exhibit B to *IRU formal complaint* ("January 24 Dennehy Affidavit").

[84] *March 10 Merger Order* ¶¶ 3, 69. *See also Divestiture formal complaint* ¶¶ 138, 493-495, 497; Qwest's Answer to the *Divestiture formal complaint* ¶ 138 (admitting that the IRU agreement was not submitted).

[85] *March 10 Merger Order* ¶ 25.

B. Qwest Has Provided Prohibited Section 271 Service By Mislabeling Its "Corporate Communications Traffic."

AT&T noted in its comments to the previous audit reports that it appeared that Qwest was providing in-region interLATA service to third parties in the guise of "corporate communications."[86] The *Divestiture formal complaint* offers substantial evidence that this in fact occurred. It alleges that Qwest transported in-region interLATA "corporate communications traffic" for *un*affiliated companies such as ANR Pipeline, Star Telecom, Touch America, ICG Communications, Primus Telecommunications, Cais Internet and Electric Lightwave in violation of the *Qwest Merger Orders* and Section 271.[87] As Touch America has demonstrated, Qwest's claim that this traffic is permissible "internal corporate communications," such as Official Services or incidental interLATA traffic, is baseless.[88]

C. Qwest Has Otherwise "Provided" In-Region InterLATA Service And Unlawfully Retained the Revenues from those Customers.

All three Arthur Andersen audits show that Qwest is billing and branding in-region interLATA services as Qwest services. In the most recent audit, the auditor identified 657

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[86] Letter from Aryeh Friedman, AT&T to Dorothy Atwood, Chief, Common Carrier Bureau and David Solomon, Chief, Enforcement Bureau, July 18, 2001 at 3.

[87] *Divestiture formal complaint* ¶¶ 338-340, 350-354, 431-446, 506 (alleging that this constituted untruthful statements to the Commission). Qwest also served Government Systems (a non-Section 272 affiliate).

[88] As Touch America correctly demonstrates, these services are certainly not "Official Services" or Incidental Services allowed under Section 271. *Divestiture formal complaint* ¶¶ 76 & note 9, 350-354; Touch America's Reply in the *Divestiture formal complaint* Proceeding ¶¶ 65-68. *See also* the Modification of Final Judgment, *U.S. v. Western Electric Co.*, 569 F. Supp 1057, 1097 n.175 (D.D.C.), *aff'd sub nom. California v. U.S.*, 464 U.S. 1013 (1983) ("These services represent communications between personnel or equipment of an Operating company located in various areas and communications between Operating companies and their customers" the latter involving services such as directory assistance where "any interLATA administrative facilities involved are not 'for hire'"); *id.* n.179 describing the four basic categories of Official Service systems).

account records as having prohibited in-region service component codes (almost 200 more than identified in 2001), and that in-region private line services for 330 customers (almost 70 more than identified in 2001) were "billed and branded as Qwest services."[89] Qwest in the *Divestiture formal complaint* proceeding admits that, as noted in the auditor's reports, end user Touch America customer accounts were billed in Qwest's name.[90] And both Touch America's *Divestiture formal complaint* and the March 11, 2002 audit indicate that Qwest is still holding revenues for customer traffic that Qwest had branded, billed and collected for itself, but which rightfully belongs to Touch America.[91]

The most recent 2002 audit also noted "that certain invoices during 2001 for approximately 1,000 customers who subscribe to Internet-related services did not include a separate Global Service Provider ('GSP') charge for in-region interLATA traffic carried by Touch America" (representing approximately $2 million in 2001).[92] If true, this violates Qwest's representation concerning how it would structure the GSP arrangement in order to avoid a Section 271 violation.[93]

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[89] March 11 2002 Arthur Andersen Audit Report, Att. 1 at 3 (emphasis added) ("March 11 Audit").

[90] Qwest's Answer to the *Divestiture formal complaint* ¶ 334.

[91] *Divestiture formal complaint,* ¶¶ 250-251 ("[w]ith those payments . . . Qwest failed to provide any information whatsoever regarding the customers or circuits to which those revenues related" and without that information "Touch America . . . to this day cannot determine which customers were affected, verify that those customers are now in the Touch America databases, and verify that those customers are now being billed properly").

[92] March 11 Audit at 2. There may have also been improper access by three employees who served on the major account support team ("MAST") to Touch America Account Records, and improper retention by Qwest of revenue from the sale of prepaid calling cards that should have been paid to Touch America. *Id. See also* Qwest's Answer to the *Divestiture formal complaint* ¶ 222 (admitting "super user" access to certain accounts).

[93] *April 14, 2000 Divestiture Plan* at 68 ("The GSP is paid for its services only by end users . . .

(continued . . .)

Finally, Touch America alleges in the *Divestiture formal complaint* that Qwest retained "metered customers and service" and provisioned them with in-region interLATA service,[94] and that Qwest engaged in the direct marketing of prohibited in-region interLATA services.[95] If proven, this is a patent and direct violation of Section 271.

II. QWEST, CONTRARY TO ITS APPROVED DIVESTITURE PLAN AND IN VIOLATION OF SECTION 271, MADE TOUCH AMERICA DEPENDENT UPON IT WHEN PROVISIONING THE TRANSFERRED CUSTOMERS.

In the *March 10 Merger Order* the Commission held that in order to comply fully with Section 271 and the *Qwest Teaming Order*, the buyer of U S WEST's in-region services and customers had to be completely independent of Qwest.[96] If the buyer (Touch America) had to depend on Qwest to support or provision the transferred customers, Qwest would be in a preferred position to re-acquire those transferred customers once it obtained Section 271 approval. This "jumpstart" on long distance services was prohibited under the scheme enacted by Congress in Section 271.[97] Moreover, dependence on Qwest would result in Qwest's

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(. . . continued)
and the GSP retains all of its revenues"), *id.* at 71 ("The GSP arrangement described above will ensure compliance with the requirements of Section 271); *id.* at 80 (Qwest is not "providing" in-region interLATA service because it "does not . . . receive any of the revenue for the GSP's interLATA services").

94 *Divestiture formal complaint* ¶¶ 447-453; Touch America's Reply in the *Divestiture formal complaint* Proceeding, ¶¶ 115-116, 120.

95 *Divestiture formal complaint* ¶¶ 429, 454-468; Touch America's Reply in the *Divestiture formal complaint* Proceeding ¶ 91 & Exhibit I. *See also* allegations regarding provisioning of in-region interLATA VoIP services in the *Divestiture formal complaint* ¶ 427; Qwest's Answer to the *Divestiture formal complaint* ¶ 427, and Touch America's Reply in the *Divestiture formal complaint* Proceeding ¶ 135.

96 *March 10 Merger Order* ¶ 14.

97 *Qwest Teaming Order* ¶ 41("[T]hrough their branding of the combined offering, both Ameritech and U S WEST are well poised to substitute the long distance service offered by their

(continued . . .)

"premature entry into the long distance market by allowing them to accumulate an entrenched base of full-service customers before receiving section 271 authority, thereby undermining the incentive Congress created in section 271."[98] In response to these concerns, Qwest assured the Commission during the subsequent review of the Divestiture Plan that Touch America would be independent of Qwest when providing in-region interLATA service.[99]

First, Qwest assured the Commission that it would provide Touch America with licenses and data processing services so that "Touch America representatives will be able to utilize the existing Qwest databases to maintain accounts for existing Touch America customers, set up new accounts, obtain access to call detail records and other customer data in order to provide customer service, and engage in certain other provisioning activities" and that security precautions would be implemented "to ensure" that Qwest staff would not have access to this information.[100] But, as Touch America now alleges, "Qwest has exercised such control over the data systems and software as to prevent Touch America from independently operating or

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(. . . continued)
section 272 affiliate, when they obtain section 271 approval, into the CompleteAccess or Buyer's Advantage package in the future").

[98] *See, e.g.*, *id.* ¶¶ 39, 41. Similarly, in the *U S West Calling Card* case, the Commission struck down an arrangement whereby U S WEST teamed with Frontier Communications Services, Inc. to provide one-stop local and long distance calling through a single calling card because U S West, was unlawfully providing long distance service to consumers in violation of Section 271. Memorandum Op. and Order, *AT&T Corp. v. U S WEST Communications, Inc.*, 16 FCC Rcd. 3574 (2001).

[99] *April 14, 2000 Divestiture Plan* at 18 (that under the Divestiture Plan "Qwest has further protected Touch America's ability to maintain a viable independent business within the region without restricting Touch America's ability to grow its business for national accounts"); *see also id.* at 12 ("Touch America is a strong and independent carrier that has the financial capacity and operational experience to provide excellent service to the customer base that Qwest will be divesting").

[100] *Id.* at 40-41.

servicing Transferred Customers."[101] According to Touch America, it has been forced to rely on Qwest for its own customers' CPNI information and for reports "that should have been available directly to Touch America by accessing Qwest's underlying databases, pursuant to its license."[102] This included access to customer information for "Common Existing Customers;"[103] a category of customers particularly likely to be re-acquired by Qwest after receiving Section 271 approval.[104] Moreover, as to four other database systems as to which Touch America was licensed, Touch America has allegedly not been provided with critical reporting functionalities and/or access necessary for Touch America to adequately service the Transferred Customers.[105]

Qwest also represented to the Commission during the merger proceeding that under the Bilateral Wholesale Agreement ("BWA"), Touch America remained free to use competitive

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[101] *Divestiture formal complaint* ¶ 193.

[102] *Id.* ¶ 194.

[103] *Id.* ¶ 197; February 6, 2002 Affidavit of Kevin Dennehy ¶¶ 3, 6, Exhibit 2 to the *Divestiture formal complaint* ("February 6 Dennehy Affidavit") ("Touch America's forced reliance on Qwest for its customer information ... allowed Qwest access to Touch America's day-to-day management of its customers"); Qwest's Answer to the *Divestiture formal complaint* ¶ 197 (conceding "that the initial customer information that Qwest provided to Touch America did not include access to certain historical information for approximately 7,000 Common Existing Customers"); Touch America's Reply in the *Divestiture formal complaint* Proceeding ¶¶ 95-96.

[104] *See Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report* at 7-8.

[105] *See Divestiture formal complaint* ¶¶ 203-48. In particular, Touch America alleges that Qwest withheld meaningful access to: (1) the Customer Account Services Profile and Enhanced Reporting ("CASPER") system, that "provides access to billing and network inventory systems" (denied critical reporting functionality); (2) the Facilities and Equipment ("F&E") system, that should have had data on Touch America facilities and equipment related to the Transferred Customers and the Transferred Systems (denied critical reporting functionality and access to critical database); (3) the Billing Account Management ("BAM") system, used to enter credit and debit information (denied critical reporting functionality); and the Production Database ("PROD") system (no access or reporting).

providers of transport services to supplement or to replace the services provided by Qwest.[106] Qwest made this representation to refute AT&T's argument that Qwest would violate Section 271 because that Agreement contemplated that calls originating in-region were to be switched to Qwest's facilities and not Touch America's, with the result that Qwest would obtain a portion of the revenues from in-region customers (one of the three key criteria in the *Qwest Teaming Order* decision).[107] The Commission rejected AT&T's argument because "Touch America has no commitment to purchase wholesale service from Qwest," and "is free to build its own network or buy service from 'another interexchange carrier with a more competitive rate.'"[108] According to Touch America's complaints, Qwest's actual billing support (in contrast to what it had represented to Touch America and the Commission) precluded Touch America from purchasing out-of-region services for transferred customers "from another off-net provider."[109]

Although Qwest represented to the Commission that it would lease to Touch America four circuit switches for three years,[110] Touch America says Qwest did not do so. Instead, Touch America alleges that Qwest provided Touch America with only limited functionality and "never provid[ed] Touch America with the kind of operational control over the switches that would

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[106] *Id.* ¶¶ 305-307, 522-526 (*citing* Qwest's representations in the *Point By Point Response To AT&T Comments On The Qwest Divestiture Compliance Report* at 21).

[107] Comments of AT&T Corp, CC Docket 99-272, at 17 n.52 (May 5, 2000).

[108] *June 26 Merger Order* ¶ 17. The Commission concluded: "[t]he Bilateral Wholesale Agreement merely provides the prices, terms, and conditions under which Qwest and Touch America will make capacity available to one another, if desired. The contractual provision permits Qwest to compete, as allowed by section 271, for out-of-region service to an independent carrier." *Id.*

[109] *Divestiture formal complaint* ¶¶ 306-307.

[110] *April 14, 2000 Divestiture Plan* at 4, 19-20 and 42 (with an option to buy; Qwest's would, on behalf of Touch America, monitor and maintain those switches).

allow Touch America to perform the 'core functions' associated with the operational management of a switch."[111] Thus, Touch America could not implement least cost routing decision and could not verify costs and revenues associated with the traffic routed through the switches.

Finally, Qwest apparently forced Touch America to purchase lit fiber capacity IRUs from Qwest rather than obtaining capacity from third party carriers as Touch America had intended.[112] Touch America similarly alleges that Qwest forced Touch America to purchase billing and collection services from it even though Touch America sought out other vendors who offered lower rates.[113]

Individually and collectively, these measures, as demonstrated in Touch America's formal complaints, substantially compromised Touch America's ability to adequately provide services to the transferred customers, and as proven by Qwest's subsequent conduct, made them extremely vulnerable to reacquisition by Qwest willing to replace their private line services from Touch America with longer term service agreements with Qwest.

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[111] *Divestiture formal complaint* ¶ 282 ; *see generally* ¶¶ 272-292.

[112] *Divestiture formal complaint* ¶¶ 158-174 (through off-net leases). *See also* Maroney Affidavit ¶¶ 4-7 (stating that at that time the Qwest representative stated "we are about to do a deal that cannot leave the walls of this room, if this were to get out it could have a drastic effect within the marketplace for us"); Affidavit of Michael Meldhal ¶ 3, Exhibit 5 to the *Divestiture formal complaint*.

[113] February 6 Dennehy Affidavit ¶¶ 10-13.

III. THE COMMISSION SHOULD IMPOSE STIFF PENALTIES FOR QWEST'S VIOLATIONS AND OPEN AN INVESTIGATION INTO WHETHER QWEST MADE UNTRUTHFUL STATEMENTS DURING THE MERGER PROCEEDINGS.

The audit reports and complaint proceedings indicate a pattern of lawlessness by Qwest. Qwest has implemented a host of schemes designed solely to provide interLATA services in violation of Section 271. Qwest has done so in the face of repeated Commission admonitions after Qwest's prior schemes were exposed. And the audit reports and Touch America complaint proceedings call into question Qwest's candor during the Qwest-US WEST merger proceeding. Given: (1) the timing of the Touch America lit fiber capacity IRU agreement and the failure of Qwest to submitted this agreement to the Commission as required by the *March 10 Merger Order*; (2) the reacquisition of the transferred customers by Qwest through such IRUs; (3) allegations of misstatements to the Commission regarding the switch leasing arrangements between Qwest and Touch America; and (4) the apparently false assurances regarding the data systems and wholesale agreements, Qwest's candor in the merger proceedings has plainly been called into question, and the Commission should open an investigation into the truthfulness of statements made by Qwest during that proceeding.

CONCLUSION

The three audit reports and Touch America's formal complaints and supporting affidavits present a *prima facie* case that Qwest violated the *Qwest Merger Orders* and Section 271 of the Act. Accordingly, the Commission should issue a Notice of Apparent Liability regarding these material violations and if found to be true:

1. Require that a full audit of all Touch America's allegations be conducted;

2. Impose sanctions on Qwest for its violations of the *Qwest Merger Orders* and Section 271, including the following:

(a) Qwest should refund to customers any revenues associated with the unlawful transactions and be required to send a letter to those customers noting that Qwest violated Section 271;

(b) Qwest should cease using lit fiber Capacity IRUs (and/or misdesignating such traffic as "corporate communications traffic) to circumvent its obligations under the *Qwest Merger Orders* and Section 271;

(c) The Commission should impose the maximum fine for each violation (and there are separate violations for each transaction involved); and

(d) The Commission should advise impacted states about the scope and nature of the Commission's investigation; and

3. Open an investigation into the truthfulness of statements made by Qwest (as well as material omissions) during the merger proceedings.

/s/ Mark C. Rosenblum

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May 2, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: May 2, 2002
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

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* Filed electronically